



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

May 8, 2019

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Richard Phipps**
Tax Registry No. 924338
Brooklyn Court Section
Disciplinary Case Nos. 2016-16428

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on November 29 and 30, and December 13, 2017, and was charged with the following:

DISCIPLINARY CASE NO. 2016-16428

1. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about September 20, 2016, at a Costco Wholesale store located at 605 Rockaway Turnpike, North Lawrence, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Phipps did steal an item of clothing. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

2. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about September 20, 2016, in Nassau County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Phipps did possess stolen property. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

3. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about and between April 17, 2016 and September 26, 2016, engaged in off-duty employment at Costco Wholesale, located at 605 Rockaway Turnpike, North Lawrence, NY, without seeking Department approval prior to the start of such off-duty employment. *(As amended)*

P.G. 205-40

OFF DUTY EMPLOYMENT

In a Memorandum dated February 15, 2018, Assistant Deputy Commissioner David S. Weisel found Police Officer Richard Phipps Guilty of Specification Nos. 1 and 2 and Guilty of Specification No. 3 for which Police Officer Phipps pled Guilty to in Disciplinary Case No. 2016-16428. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

In Disciplinary Case No. 2016-15629, an 11-year member of the service entered into a post-trial settlement which included vested interest retirement for committing petit larceny. Likewise, in Disciplinary Case No. 2015-13051, an 8-year member of the service also entered into a post-trial settlement which included vested interest retirement for also committing petit larceny. I have considered the totality of the circumstances and issues concerning the misconduct for which Police Officer Phipps has been found Guilty and deem that separation from the Department is warranted. However, in light of recent precedent and in consideration of Police Officer Phipps tenure, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for Police Officer Phipps at this time.

The Police Commissioner directs that an *immediate* post-trial settlement agreement be implemented with Police Officer Phipps in which he shall forfeit thirty (30) suspension days without pay already served, thirty (30) suspension days without pay to be served, time served on suspended with pay status, be placed on one (1) year dismissal probation, the forfeiture of all time leave balances and vested interest retirement, plus retire on Modified Assignment. Should Police Officer Phipps not wish to proceed with this renegotiation as noted, this office is to be immediately notified. Forwarded for your necessary attention.

Such vested interest retirement shall also include Police Officer Phipps's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Police Officer Phipps does not agree to the terms of this vested interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented **IMMEDIATELY**.



James P. O'Neill
Police Commissioner



POLICE DEPARTMENT

February 15, 2018

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In the Matter of the Charges and Specifications : Case No.
- against - : 2016-16428
Police Officer Richard Phipps :
Tax Registry No. 924338 :
Brooklyn Court Section :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Joshua Kleiman, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent: John P. Tynan, Esq.
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111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

Charges and Specifications:

1. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about September 20, 2016, at a Costco Wholesale store located at 605 Rockaway Turnpike, North Lawrence, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Phipps did steal an item of clothing. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 – CONDUCT PREJUDICIAL
2. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about September 20, 2016, in Nassau County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Phipps did possess stolen property. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 – CONDUCT PREJUDICIAL
3. Said Police Officer Richard Phipps, while off-duty and assigned to the Facilities Management Division, on or about and between April 17, 2016 and September 26, 2016, engaged in off-duty employment at Costco Wholesale, located at 605 Rockaway Turnpike, North Lawrence, NY, without seeking Department approval prior to the start of such off-duty employment. *(As amended)*
P.G. 205-40 – OFF DUTY EMPLOYMENT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on November 29 and 30, and December 13, 2017. Respondent, through his counsel, entered a plea of Not Guilty to Specification Nos. 1 and 2. Respondent pleaded Guilty through counsel to Specification No. 3 and testified in mitigation of the penalty. The Department called Michael DeMaio, Thomas Farano and Cheryl Murray as witnesses. Respondent called Christopher Young and Anthony Fraser as witnesses and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of Specification Nos. 1 and 2. Having pleaded Guilty to Specification No. 3, Respondent is found Guilty.

FINDINGS AND ANALYSIS

Introduction

Most of the facts in this case are undisputed. It is the interpretation of those facts that is at issue. Respondent was employed off-duty at the Costco Wholesale store located at [REDACTED]

[REDACTED]¹ It was undisputed that he did not at the time in question have Department permission for this. It was further undisputed that in September 2016, loss prevention officials from Costco viewed surveillance video of Respondent inside the store. The video appeared to show Respondent walk to a table of clothing for sale, pick up a sweatshirt, and carry it toward the employee break room. The video further showed Respondent exit the break room, wearing the sweatshirt. He left the store without paying and walked toward the parking lot. The loss prevention officials subsequently confronted Respondent.

Respondent claimed at trial that he did not steal the sweatshirt. He testified that one of his responsibilities at Costco was to drive a forklift in the freezer section, so he wanted a sweatshirt for work. He asserted that several days prior to September 20, 2016, he purchased two identical men's Champion sweatshirts at Costco. He gave one to his son and took the other one to work. On September 19, 2016, he left the sweatshirt in the employee break room, but it no longer was there when he returned. He asserted that it was the policy of the store to remove left items of clothing such as this. The next day, therefore, just before his shift started, he took another sweatshirt and brought it to the break room. He found out that he was not going to be working in the freezer that day, so he brought the sweatshirt back out to his car.

The Department rejected Respondent's account as implausible and contradicted by the video and store records. The Department asserted that the video appeared to show Respondent maneuvering the sweatshirt so as to remove the price tags. The Department questioned why Respondent would put the sweatshirt on while in the store, only to take it out to his car and leave it there. Finally, the Department argued that Costco purchase records did not show any purchase that matched Respondent's account.

ANTHONY DEMAIO was employed in loss prevention at the [REDACTED] Costco. He knew Respondent as an employee there. Regarding Tuesday, September 20, 2016, DeMaio testified that he was notified by the store general manager or "warehouse manager," Individual 1, that an employee had approached him about some suspicious activity. Individual 1 gave DeMaio a time and date, and DeMaio retrieved the surveillance video in question (Dept. Ex. 2). Individual 1 told DeMaio to keep his eyes out for a sweatshirt (Tr. 15-17, 24-26, 28-29, 35, 46).²

THE VIDEO depicted Respondent walking into the [REDACTED] Costco around 1939 hours. He was wearing a gray short-sleeve shirt (clip "1_15_R" etc.). He then was seen carrying a shirt that, according to DeMaio, "was not paid for" (clip "1_03_R" etc.). As Respondent walked through the store, according to DeMaio past the tire center and DVD aisle, he was "playing with" the shirt in his hands as though removing the tags or searching for them (clip "DVR_ch2_main" etc.). DeMaio stated that Respondent walked into the food section, and then went into the employee break room. Carrying the sweatshirt in his right hand, Respondent walked past the registers, but not out of the store, to get to the break room (clip "DVR_ch11_main" etc.). The break room was to the left as one walked past the registers. Respondent punched in on the time clock and entered the break room, still carrying the shirt (clip "1_01_R_20160920194212"). DeMaio agreed that Respondent would have walked past the main office and the loss prevention

² Individual 1 had relocated out of state by the time of trial and was not called as a witness.

office while holding this shirt. Respondent came out of the break room wearing the sweatshirt, which was open in the front, passed the two offices again, and left the store (clips "1_01_R_20160920194722" & "1_06_R_20160920195749"). He then returned to the store, without the sweatshirt (clip "2_11_R" etc.) (Tr. 17-18, 29, 42, 44-45, 48-52, 54-64, 66-68).

DeMaio prepared a hand-drawn diagram (Dept. Ex. 1) of the store depicting the layout and the route Respondent took on the video. According to DeMaio, Respondent took a circuitous route through the store after picking up the sweatshirt. DeMaio stated that Costco employed receipt checkers at the exit to the store past the registers. As Respondent already was wearing the sweatshirt, however, the checker did not interact with Respondent and "wouldn't even acknowledge that he made a purchase and has a receipt" (Tr. 19-20, 43-44).

DeMaio testified that he contacted the manager of loss prevention, Thomas Farano, after viewing the video. Farano later viewed it for himself and set up an interview for Respondent to speak to them (Tr. 20-22).

According to DeMaio, at the interview, Respondent "knew he made a mistake." He "admitted to the sweatshirt" and said that he was "sorry for what I did." DeMaio did not hear Respondent say anything about previously purchasing a sweatshirt, but he was not present for the entire interview. DeMaio testified that it was Costco policy [REDACTED] [REDACTED]
[REDACTED]

DeMaio testified that the [REDACTED] Costco generally was open on weekdays from 9:30 a.m. to 8:30 p.m. One generally needed a membership card to shop at Costco, but employees automatically received free memberships (Tr. 28-29, 41-42).

DeMaio was asked whether Costco had a policy about employees purchasing items from the store and leaving them in the break room. He answered that "the policy was they can't leave

merchandise." DeMaio said that if he purchased something, he would not leave it in the store. He denied that loss prevention removed merchandise from the break room (Tr. 32-33).

DeMaio indicated that employees "technically" were "not supposed to" take unpurchased merchandise into the break room and keep it there to purchase later. There was a Costco employee manual, but DeMaio was unsure if this topic was covered. DeMaio testified that there was a set of lockers for employee use outside the break room (Tr. 30-35).

THOMAS FARANO was the regional director of loss prevention for Costco. He testified that Individual 1 informed him concerning the September 20, 2016, incident. When Farano came to the [REDACTED] store on September 26, 2016, he viewed the video. Farano identified Respondent at trial as a part-time stocker at the [REDACTED] store. Farano also was made aware that he was a New York City police officer (Tr. 69-73).

Farano testified that when Respondent arrived for work on September 26, 2016, he was asked to come to the office, where Farano and DeMaio interviewed him. According to Farano, Respondent "indicated that he had taken the sweatshirt," which was at his home. When Farano asked why he did it, Respondent "really didn't have a reason" and "was more upset at himself" for doing it. Individual 1 came to the office as well at one point, and Respondent told him "what he had done." Once Respondent was informed that the [REDACTED] police had been called, he expressed concern about his NYPD job, but Farano explained there was nothing he could do about that. No audio recording was made of the interview and Respondent did not make a written statement. When the police arrived, Respondent was arrested. Farano denied that Respondent mentioned anything to him about previously purchasing "that sweatshirt," but there were times Respondent was left alone with the [REDACTED] police officers (Tr. 73-75, 84-85, 88-90, 94, 106-07).

In contrast to DeMaio, Farano testified that there were various factors that went into Costco's decisions [REDACTED] There was discretion at the store manager level (Tr. 90-92).

Farano looked into Respondent's Costco purchase history dating back to April 1, 2016 (see Exs. 3-b, printouts of purchase history). He did not see purchases of sweatshirts on either of Respondent's two membership numbers. Respondent's account could have had one number for himself and one for a spouse (Tr. 75-82, 104, 107-08).

Farano also located Respondent's work time records for the period in question (see Ex. 4). The records showed that on September 20, 2016, Respondent clocked in at 1942 hours and clocked out at 2333 hours (Tr. 82-84).

Farano agreed that there was a Costco employee manual. He stated that employees were not supposed to purchase items while working, although it does happen (Tr. 86).

Farano testified that cashiers were not supposed to use their own membership cards to make purchases for other people. He indicated that there was a 2% rebate on most employee purchases, so buying for someone else would unfairly inflate the cashier's purchase history. If a customer did not have their card, they were supposed to be directed to the membership desk to get a temporary card. There was, however, a feature known as '99.' This was an "ambiguous" membership number that a cashier could input as an alternative to a customer locating or replacing a missing card, but the practice was "discouraged." The cashier did not have the ability to look up customer memberships from the sales register. There was surveillance video of the bank of registers, but not atop each individual register akin to those above gaming tables at a casino (Tr. 104-05, 109-11).

Farano indicated that if loss prevention found tagged merchandise in the break room with no receipt, it was supposed to be brought to the warehouse manager. Employees were allowed to

keep their own coats and jackets and such in the break room, but management – not loss prevention – occasionally cleaned out the room because employees left items there “sometimes for very long periods of time” (Tr. 86-87).

Farano opined that one could fit a sweatshirt, crunched to make it small, in one of the employee lockers (see Exs. 5a &b, photographs of row of lockers and one open locker, respectively; Tr. 98 103).

Farano testified that Individual 1 was the “warehouse manager.” meaning he was responsible for the entire “warehouse,” i.e., the entire store. Depending on the store, there also could be three or four assistant warehouse managers, a front end (sales registers) manager, a pharmacy manager, and a receiving manager (Tr. 114).

CHRISTOPHER DEAN YOUNG worked for Costco Wholesale in various locations until 2015. At the time of trial, he worked as operations manager for a trucking company. He held many positions at the [REDACTED] Costco, including forklift operator and freezer/cooler driver. He last worked in [REDACTED] in early 1998. He also was a family friend of Respondent (Tr. 137 38, 146-47).

Young described the freezer as a large room, bigger than the trial room. The forklift work generally was done after hours so as not to endanger customers. The temperature in the room was in the teens, so it was necessary to wear warm clothing. Respondent occasionally worked as a forklift driver. Employees generally knew their positions ahead of time, but they often were subject to change due to people calling out sick and such (Tr. 138 41).

Young testified that the [REDACTED] store did not provide cold-room gear to workers. He had seen it at other locations. If an employee came to work and learned that he would be working in the freezer, “mostly we just grab an item from the sales floor.” Young asserted that there was no requirement to purchase the item, because the registers would not be open when the

freezer employees were working. “[W]orst case scenario you put it back and go back in the department when you’re done or return to the vendor, get a stain on it or whatever it is.” Returns to vendor happened when goods were damaged or returned by customers. The merchandise got shipped back to the vendor and the vendor received partial reimbursement (Tr. 141-42, 147-48).

Young testified that his own cold-weather gear sometimes was removed from where he had stored it by other workers that needed it. Sometimes he found his clothing in the go-back bin, where unwanted Costco merchandise was placed to be returned to vendor (Tr. 149-50).

Young testified that employees were allowed to make purchases in the store while working. According to Young, the ‘99’ method was useful for employees because they might not have their membership cards on their person, and they only had perhaps a 15-minute break to buy the items they needed (Tr. 143-44).

ANTHONY FRASER was the floor manager at the [REDACTED] store, serving under Individual 1. He oversaw the delivery trucks as well as the freezer. Fraser testified that freezer employees were expected to provide their own cold gear. He stated that if someone came to work and unexpectedly had to work in the freezer, they “would just go get something off the sales floor.” The employees “should” purchase it first, “but they just take it and . . . use it until, you know, you finish.” People did this because the job had to get done in a finite amount of time. After using the item, the employee could either put it back on the shelf or in the go-back bin by the register. It would not be okay to remove the item from the store and leave with it (Tr. 152-54, 156-61, 163-66, 168-69).

Fraser testified that the break room occasionally was cleaned out, and that loss prevention would check to see if merchandise was there that should be on the selling floor (Tr. 160).

CHERYL MURRAY was a front-end supervisor at the [REDACTED] Costco. She was trained as a cashier and still worked as a cashier on occasion. Murray testified that a '99' required a supervisor's "key flick" override (Tr. 171-74).

Although there were sweatshirt purchases on her membership records, Murray denied ever buying a sweatshirt for Respondent (Tr. 178-85).

RESPONDENT testified that he worked at Costco in several different positions, including manager titles, before becoming a police officer. He later returned to Costco part-time because their health insurance was better for his son, [REDACTED]. His usual position once he returned was forklift operator. His total time with Costco was between five and ten years. He admitted that he did not have permission from the Department to work at Costco when he returned on a part-time basis. He further admitted that this was not the first time he had been disciplined by the Department for off-duty employment at Costco (Tr. 197-200, 228-31).

Respondent testified that he kept a sweatshirt in the break room for use in the freezer. He purchased two Champion sweatshirts at the [REDACTED] Costco a day or two before September 20, 2016. When asked what prompted him to do so, he answered, "[P]revious to that I would use other sweatshirts or I would use the – the manager would say go get a sweatshirt and we would go get a sweatshirt and wear it and a jacket. I saw inexpensive sweatshirts so I bought two." He left one in the break room and gave one to his son. That was the time he last saw his sweatshirt. He asserted that he borrowed someone else's Costco card to buy this, but did not remember whose it was. Respondent testified that he often made purchases at the close of store hours. If he did not have his wallet, it was common for the cashiers to either use their own cards, someone else's, or the '99' feature. Respondent often would leave his wallet in his locker because it pressed against his side while driving the forklift. He did not have a lock for this locker (Tr. 203-04, 209, 212-14, 231-35, 240-42).

In any event, when Respondent finished his September 19, 2016, shift, he saw that his sweatshirt no longer was in the break room. He claimed that “it’s general when you leave merchandise inside the break room, freezer driver operators, sometimes loss prevention, . . . membership service staff will put it back. So it was common practice if your sweater wasn’t there and you purchased it from the store, you could just get another sweater.” Sometimes employees’ property would be returned to the go-back cart, and sometimes to the sales floor. It also could have been stolen. Respondent claimed that the lockers were too small to fit a sweatshirt (Tr. 203-05, 209-12, 214-15, 222-23).

Respondent testified that when he arrived at Costco for work on September 20, 2016, he saw that the freezer driver was there, so he knew he would be doing something else at the store that day. He indicated that he took the route testified to by DeMaio to get to the freezer. Respondent testified that he “retrieved” another sweatshirt, identical to that which he had purchased. He came to the break room, talked to some fellow employees, and then went to his car and put the sweatshirt there. He then began his shift of work, unloading “dry” trucks instead of working in the freezer. Respondent denied removing any price tags or stickers from the sweatshirt while inside the store, but no receipt checkers stopped him. When asked why he put the sweatshirt on to walk it out to the car, he answered, “At that time I don’t know, I just put it on. It was my sweatshirt; I put it on.” There was no particular reason (Tr. 200-02, 205, 210-11, 224-26, 229-30, 236-39).

When Respondent arrived for work on September 26, 2016, he was asked to come to the office and was interviewed there by loss prevention. Respondent asserted that he told them “I purchased the sweater” and “didn’t remove any property from Costco that I didn’t purchase.” Respondent indicated that he was arrested by the [REDACTED] police, although he claimed they took a long time to do so and did not want to arrest him because he told them “the

sweatshirts were purchased" and he could be seen wearing them on camera. The matter eventually was resolved [REDACTED]
[REDACTED]

Specification Nos. 1 & 2

Respondent is charged with *stealing* the sweatshirt in question and *possessing* this *stolen property*. Under New York law, a person steals property when, with the intent to deprive another of property or to appropriate it to himself or another, he wrongfully takes, obtains or withholds the property from an owner of the property. Penal Law § 155.05 (1). It is a defense to larceny by trespassory taking, however, that the property was taken under a good-faith claim of right. Penal Law § 155.15 (1); People v. Zona, 14 N.Y.3d 488, 492 (2010) (defendant was entitled to jury instruction because there was record evidence to support his claim that a high-ranking sheriff's officer told him he could take property from a surplus warehouse). Respondent here is claiming that he acted under a good-faith claim of right because he recently had bought the exact same sweatshirt, which either was stolen, or taken back by store personnel, so he essentially was entitled to re-take what was rightfully his. Viewing the evidence as a whole, the Court rejects Respondent's argument as implausible, contrary to common sense, and incredible.

It is certainly possible, as several witnesses testified, that the break room could get cleaned out from time to time, and that an employee's legitimately possessed items could get discarded. It is certainly possible that a freezer worker could have seen a Champion sweatshirt, assumed it was from Costco, used it to work, and then placed it in the go-back bin or back on the shelf. The problem is that Respondent's testimony is, as a whole, tendentious and unlikely.

Respondent's account rests, first and foremost, on his assertion that he bought the two sweatshirts. Farano, the loss prevention manager, credibly testified in detail about Respondent's interview. He stated that while Respondent made several statements and admitted that he had

done something wrong, he never stated that he bought two sweatshirts only days before. No reason was suggested for Farano to lie about this interview and the Court credits his account. Individual J, the general manager who, if it were true, should have known all about the policy of removing items from the break room, was present at this interview. It would have been the perfect time for Respondent to mention that his rightfully owned property had been taken by store personnel. Yet he did not do so.

Further, it was undisputed that Respondent's Costco purchase records did not list the sweatshirts. There was testimony about various other ways both employees and customers could buy at Costco. These included using someone else's membership card or the '99' feature on the register. Respondent claimed at trial, incredibly, that he did not know what method he used, or whose card, to purchase these sweatshirts. Nevertheless, at the Department's request, Costco looked extensively through its files to match sweatshirt purchases to Respondent's timeline and claim. No purchases were pointed to that represented the supposed purchase. This included the testimony of Cheryl Murray, who testified that while there were purchases of sweatshirts on her account from September 2016, she never bought one for Respondent. Murray apparently was friendly enough with Respondent that she took photographs of the interior of the store for Respondent to use at trial (Tr. 242-49 [Respt. Exs. A & B]).

Young and Fraser, the Costco employees called as witnesses by Respondent, testified that if employees came to work and found out they were going to be working in the freezer, they could take a sweatshirt off the rack and put it back when they were done, either on the shelf or the go-back cart. Only Respondent testified that employees could simply replace items they believed had been wrongfully removed from the break room. In any event, Respondent admitted he did not know, when first walking into the store on September 20, 2016, that he would be working in the freezer. He also conceded that his usual practice was to borrow an item from the

shelves. He gave no explanation, therefore, why he needed to replace the sweatshirt right there and then.

One of the strongest indicators against a good-faith claim of right here is the testimony of Fraser, currently an assistant manager at the [REDACTED] Costco. He testified that while employees could use store merchandise to work in the freezer during their shifts, it was not acceptable to remove these items from the store. The Court credits Fraser's testimony, as this would allow employees to perform their job functions without damaging the company financially. In contrast, Respondent's testimony that employees could replace with new product any Costco merchandise removed from the break room makes little sense.

Respondent also gave no reason why he needed to take the new sweatshirt out to his car. His testimony concerning the employee lockers was bizarre. He claimed that they were too small to fit the sweatshirt. He also claimed, however, in talking about why he might have to make a Costco purchase using someone else's membership card, that he sometimes would leave his wallet in an unlocked locker. The Department's photographs (Exs. 5a-b) demonstrate that not only did a sizable number of employees put locks on their lockers, but the lockers themselves obviously could fit a folded or balled sweatshirt. Respondent's testimony is thus, again, not believable.

Respondent's actions while taking the sweatshirt out to his car constitute evidence of consciousness of guilt, i.e., they demonstrate that he knew he was stealing the sweatshirt and not taking it as of right. Respondent testified that he did not remove any price tags or stickers from the garment while in the store. The video of Respondent finally walking out of the store wearing the sweatshirt, however, shows no tags or stickers. Moreover, Respondent acknowledged that he would have passed the receipt checkers on the way out of the store and he was not stopped by them. He also was wearing the sweatshirt, an act for which he literally provided no rationale:

"At that time I don't know, I just put it on. It was my sweatshirt; I put it on." The reasonably likely explanation is that Respondent wanted it to appear as though he was wearing the sweatshirt the way anyone would wear something they entered the store with.

In sum, the Court finds that the Department proved that Respondent stole the sweatshirt and possessed it as stolen property by wrongfully taking the sweatshirt from the store and thus intentionally depriving the rightful owner, Costco Wholesale, of the sweatshirt. The Court also rejects Respondent's defense of a good-faith right to remove the merchandise. As such, he is found Guilty of Specification Nos. 1 and 2.

Specification No. 3

Respondent's counsel indicated that Respondent was pleading Guilty to the third specification, which charges that he engaged in off-duty employment at the [REDACTED] Costco without seeking Department approval prior to the start of such off-duty employment. Respondent admitted in his testimony that he did not have Department approval to work at Costco. As such, Respondent is found Guilty.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 7, 1999. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Some Department penalties for shoplifting have involved outright termination. See, e.g., *Case No. 2014-12548* (Dec. 22, 2015). The bulk of the precedent, however, seems to lean toward vested-interest retirement and separation from the Department. See, e.g., *Case No. 2016-15629* (Dec. 6, 2017); *Case No. 2015-13051* (Sept. 12, 2016). The Police Commissioner, but not this tribunal, however, can offer a vested-interest retirement agreement in lieu of dismissal from

employment, see Administrative Code § 14-115 (a). Therefore, the Court recommends that Respondent be ***DISMISSED*** from employment with the Department.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER RICHARD PHIPPS
TAX REGISTRY NO. 924338
DISCIPLINARY CASE NO. 2016-16428

Respondent was appointed to the Department on July 7, 1999. On his last three annual performance evaluations, he received an overall rating of 4.0 "Highly Competent." [REDACTED]

Respondent has a prior disciplinary history. In 2004, he forfeited 27 vacation days after pleading guilty to engaging in off-duty employment without permission or authorization, engaging in such off-duty employment in excess of 20 hours per week, in addition to multiple AWOL violations.

From April 23, 2016, to May 25, 2016, Respondent was suspended from duty following [REDACTED]. The disposition in the disciplinary proceeding related to that matter still is pending. [REDACTED]

From September 27, 2016, to October 26, 2016, Respondent was suspended from duty following his arrest for petit larceny in connection with the instant proceeding.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials